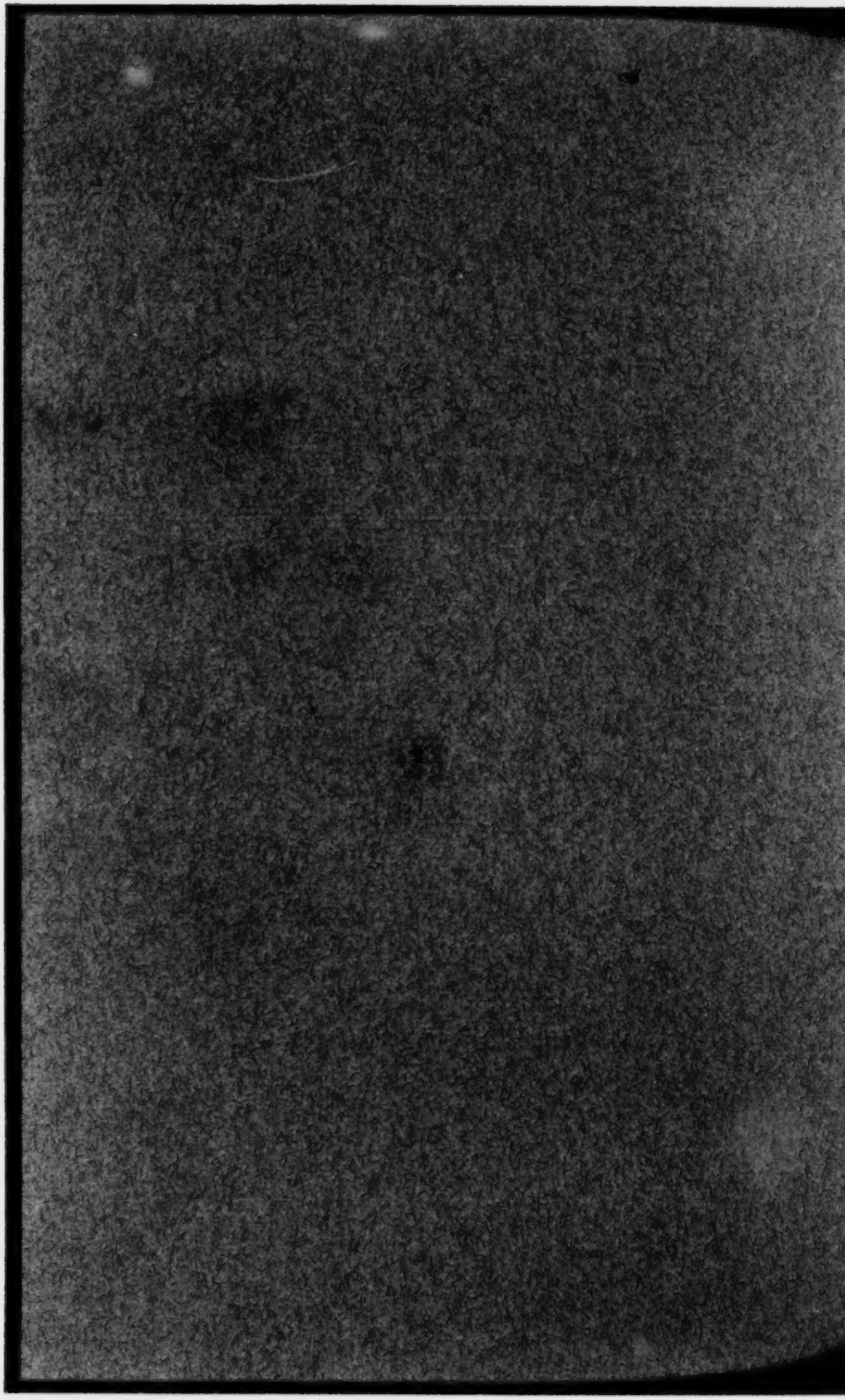

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 724

TROY-PARISIAN, INC., PETITIONER

v.

THE UNITED STATES OF AMERICA, ON RELATION AND FOR THE BENEFIT OF THE ADMINISTRATOR OF THE FEDERAL HOUSING ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment of the District Court of the United States for the District of Idaho, Southern Division (R. 45–46), based on its findings of fact (R. 22–39) and its conclusions of law (R. 40–44), was entered without an opinion. The opinion of the United States Circuit Court of Appeals for the Ninth Circuit (R. 162–166) is reported in 115 F. (2d) 224.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 30, 1940 (R. 167). A petition for rehearing was denied on November 29, 1940 (R. 168). The petition for a writ of certiorari was filed January 28, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in an action by an assignee of a sales contract, a provision of the contract expressly waiving defenses in the event of assignment is a bar to the defense of breach of warranty.

STATEMENT

On or about May 11, 1936, petitioner, Troy-Parisian, Inc., made and delivered to Detweiler Bros., Inc., a conditional sales contract and installment note (R. 24), the complete text of which is set out in the complaint (R. 3–8) and in the court's findings (R. 24–29). The note was in the form of an ordinary negotiable instrument. The contract provided, among other things, for the purchase, sale, and installation of an automatic stoker, a water cooler, a forced air evaporator, and a refrigerating compressor, all listed by their trade names (R. 24). Article 5 of the agreement authorized the seller to assign the contract to the Twin Falls Bank & Trust Company without notice to the pur-

chaser and provided that when assigned the contract should be free from any defense, counterclaim, or cross-complaint by the purchaser (R. 27).

On May 11, 1936, for value, Detweiler Bros., Inc., payee, endorsed the contract and note to the Twin Falls Bank & Trust Company (hereinafter called the bank) (R. 29), which was an insured institution pursuant to Title I, Section 2, of the National Housing Act, c. 847, 48 Stat. 1246 (12 U. S. C., Supp. V, Sec. 1703), and upon the assignment, the note and contract became insured against loss by reason of nonpayment (R. 29, 30).

Subsequent to the endorsement of the note and contract to the bank and after having paid nine installments, Troy-Parisian, Inc., refused to make further payments on the ground that there had been a breach of implied warranty of fitness as to the stoker and that the other articles had been paid for (R. 13–14, 16–18). No payments were made after February 12, 1937 (R. 31). Thereafter, the bank declared the entire sum due, according to the terms and conditions of the note and contract, and demanded payment from the Federal Housing Administration. The Federal Housing Administration paid the bank the amount then owing; the note and contract were endorsed and transferred to the Administration, which ever since has been the holder of the instruments (R. 31–32).

Suit was commenced in the District Court of the United States for the District of Idaho by the

United States to recover from Troy-Parisian, Inc., the amount due on the note and contract (R. 2–11). The petitioner answered, denying any indebtedness and alleging as a defense a breach of implied warranty of fitness and recission with respect to the stoker and full payment as to the other items (R. 12–22). The case was tried by the court without a jury and resulted in a judgment for petitioner (R. 45). On appeal the court below reversed the trial court on the ground that Article 5 of the contract was a bar to the defense interposed (R. 162–166).

ARGUMENT

The petitioner contends that under the law of Idaho the note in controversy is nonnegotiable, that the respondent, as assignee of the note, is therefore subject to the defense of breach of warranty and failure of consideration, that the inadequacy of the equipment for which the note was given in payment constitutes a breach of warranty and failure of consideration, and that the agreement to waive all defenses is void. The court below held that the agreement was a valid waiver of the defense of breach of warranty, and did not consider the other questions raised by petitioner. The decision below, we submit, is correct, is not in conflict with the local law of Idaho, and presents no question requiring review by this Court.

Section 71 of the Uniform Sales Act as adopted in Idaho (Idaho Code Ann. (1932), Sec. 62–601)

provides that, as between buyer and seller, implied warranties may be negatived by express agreement. *A fortiori,* an express agreement barring the defense of breach of implied warranty in the case of assignment does not contravene any public policy. Beutel, *Negotiability by Contract,* 28 Ill. L. Rev. 205. Buyer and seller dealt with each other on equal footing; no fraud is alleged; and, as the court below observed (R. 164), the clause was deliberately inserted as a means of facilitating the financing of the sale through the local bank.

The question of whether a waiver of defenses is a bar to a claim of breach of implied warranty has never been decided by the Idaho courts. In *Anglo-California Trust Co.* v. *Hall,* 61 Utah 223, however, a similar provision was held to preclude such a defense. In *American National Bank* v. *Sommerville,* 191 Cal. 364, the Supreme Court of California held that an agreement to waive defenses, like all contracts, must be supported by consideration and that the agreement was, therefore, no bar to the defense of total failure of consideration. The court expressly distinguished, however, a case of a breach of warranty, and pointed out that even as to a total failure of consideration the waiver clause would be given effect if an assignment of the contract was taken in reliance on the waiver (*id.,* pp. 372–374). Cf. *Parker* v. *Funk,* 185 Cal. 347. In *Pacific Acceptance Corp.* v. *Whalen,* 43 Idaho 15,

relied on by petitioner, the Supreme Court of Idaho expresed approval of the opinion in the *Sommerville* case and held that such a waiver was no bar to a defense of fraud, but the Idaho court likewise distinguished the case of a breach of warranty.

Petitioner contends (Pet. 12–13) that Article 5 is inapplicable because of an alleged total failure of consideration. The failure of consideration claimed, however, is merely the alleged breach of warranty, and it is clear that a breach of warranty does not constitute a total failure of consideration. Moreover, an alleged breach of implied warranty as to one of four articles constitutes at most only a partial failure of consideration. Cf. *Pioneer Bank & Trust Co.* v. *MacNab,* 41 Idaho 146; *Daniels* v. *Englehart,* 18 Idaho 548; *Caldwell* v. *Ruddy,* 2 Idaho 1. That the contract is not separable as to the various items is clear. The note contains a unit price, and any payment is applicable to all items (R. 28). The title-retaining provision runs to all items and if payment is not made the vendor can recover all the items (R. 26). Application for the loan (R. 47) lumps all of the items together at one price. Finally, petitioner paid $397.02 down (R. 3) and $628.83 in installments (R. 31), and an additional payment of $32.00, which leaves $200.03 paid on account of the stoker (R. 36) long after petitioner claimed that it was not suitable. This indicates that petitioner believed he was obligated to pay a unit price for all items (see R. 87). There is noth-

ing in the opinion in the *Whalen* case, it should be added, to indicate that the waiver agreement would be held inapplicable even as to a total failure of consideration where, as here, the assignment of the contract is taken in reliance on the waiver.

Petitioner's contention that Idaho Code Ann. (1932) Sec. 28–110 [1] invalidates Article 5 is without substance. This statute, which was not invoked by petitioner in the court below, applies only to contracts restricting access to the courts and has never been applied to agreements defining contractual rights and obligations of the parties. Certainly it does not qualify in any way the provision of the Uniform Sales Act permitting waiver of the defense of implied warranty. Idaho Code Ann. (1932), Sec. 62–601. The cases cited by petitioner involve agreements which either limit the time within which suit might be brought (*Douville* v. *Pacific Coast Casualty Co.*, 25 Idaho 396; *Gaffney* v. *Royal Neighbors of America,* 31 Idaho 549; *Harding* v. *Mutual Benefit Health & Accident Assn.*, 55 Idaho 131) or waive the statutory right of appeal (*General Motors Acceptance Corp.* v. *Talbott,* 38 Idaho 13), and are plainly not in point.

[1] "Limitations on Right to Sue.—Every stipulation or condition in a contract, by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void."

CONCLUSION

The decision below is correct and is not in conflict with applicable local law of Idaho. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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